No. 11587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

L. H. McClintock and Florence L. McClintock, co-partners, doing business under the fictitious name and style of McClintock Display Company,

Appellants,

vs.

Harry C. Westover, Collector of Internal Revenue,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

BRIEF FOR THE APPELLEE.

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FOR THE NINTH CIRCUIT

L. H. McClintock and Florence L. McClintock, co-partners, doing business under the fictitious name and style of McClintock Display Company,

Appellants,

vs.

Harry C. Westover, Collector of Internal Revenue,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The only previous opinion in this case is the memorandum opinion of the District Court [R. 20-22], which is not reported.

Jurisdiction.

This appeal involves federal manufacturer's excise taxes. The taxes and interest thereon in dispute in the aggregate sum of $20,673.38 for the 13 months' period from October 1, 1941, to October 31, 1942, inclusive, were assessed by the Commissioner of Internal Revenue on the Miscellaneous List for January, 1943, on or about March 10, 1943, and were paid to the Collector of Internal Revenue on or about January 26, 1944. [R. 4, 24, 26.] A

claim for the refund thereof was filed on October 13, 1944 [R. 4-5, 7-17, 26], and was rejected by the Commissioner by notice dated April 16, 1945. [R. 5, 26.] On February 7, 1946, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayers brought suit in the District Court for recovery of the taxes and interest paid. [R. 2-17.] Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code, as amended. The judgment was entered on October 16, 1946, in favor of the Collector, dismissing the taxpayers' action, with costs. [R. 31-32.] The taxpayers' motion for a new trial, filed on October 24, 1946, was denied by the District Court on December 24, 1946. [R. 32-36.] Thereafter within three months the taxpayers' notice of appeal was filed on February 18, 1947. [R. 37.] The jurisdiction of this Court is invoked by the provisions of Section 128 (a) of the Judicial Code, as amended.

Question Presented.

Whether the "Rental Agreement" under which the taxpayers distributed the taxable rubber products manufactured by them to and for the use of their customers constituted a "lease * * * [which] shall be considered a taxable sale of such article" subject to the manufacturer's excise tax "on the price for which sold," as the District Court held and as we contend; or merely a transaction with their customers whereby the taxpayers themselves "used" such articles in the operation of their business so that only the fair market value of the articles so used was subject to tax, as the taxpayers contend.

Statute and Regulations Involved.

These are set forth in the Appendix, *infra,* pp. 1-6.

Statement.

The facts (including exhibits) were stipulated to a large extent between the parties [R. 51-56, 105-110], and also were adduced in part by testimony of the taxpayers' witnesses and their documentary evidence. [R. 40-111.] The pertinent facts, sufficient for the purposes herein, were found by the District Court substantially as follows [R. 23-29]:

At all times material herein, the taxpayers were and still are copartners doing business under the firm name of the McClintock Display Company. They have fully complied with the provisions of Sections 2466-2468 of the California Civil Code by filing a certificate of fictitious name with the County Clerk of Los Angeles County, California, and publishing it as required by law. [R. 23.] The taxes sued for herein were paid by the taxpayers to the defendant-appellee in his official capacity as the Collector of Internal Revenue for the Sixth Collection District of California who at all times material herein was such Collector. [R. 23-24.] During such time, the taxpayers were engaged in the business of manufacturing, selling and leasing certain rubber articles which were used for decorative purposes in numerous meat markets, delicatessens and similar establishments which were their customers. [R. 24.]

The taxpayers' total gross revenues of $234,869.23 realized from their business activities during the 13 months' period from October 1, 1941, through October 31, 1942, involved herein, constituted rentals received from their customers after the latter had entered into rental agreements with them. [R. 27.] All these rental revenues were derived from the taxpayers' use of a cer-

tain "Rental Agreement," a typical copy of which reads as follows [R. 27-28]:

Rental Agreement

McClintock Display Company, Lessor
The Original Rubber Leaf Decoration

3044 Riverside Drive Phone MOrningside 12113
C20396 Los Angeles, Calif., October 1, 1941

Lessee X Super Market
2000 Connecticut Ave.,
Newark, New Jersey District

[X] New Contract
[ ] Added to
[ ] Picked Up
[ ] Contract Cancelled

Rubber Leaf
20—18″ clips installed
20—18″ R. L. @ 7¢—$1.40

Total Feet 30 Total 18″Units 20 [46]

		Amount
20 Total Holders Installed	)	:
Rubber Leaf Exchanged	)	:
Collected for 3 Month	)	:
Rent Payable in Advance	)	:
	)	Total Collected 4:20

Rent from 10-1-41 to 1-1-42
Received Rent Smith Representative
Merchandise installed is the property of McClintock Display Co. This lease is revocable by McClintock Display Co. or lessee upon ten (10) days written notice.

Accepted by..Lessee

Form R-A Western Salesbook Co., 3049 1. 12 St., L. A., An. 10338 9751.

No other or further written or printed instruments were used by the taxpayers in deriving these revenues from their business activities. [R. 27.]

The manufacturer's excise taxes imposed herein and due on the transactions other than as the result of the outright sales of the rubber products made by the taxpayers were computed by the Commissioner of Internal Revenue in the aggregate amount of $21,351.76 on the basis of total gross revenue derived from the above-mentioned rental agreements in the aggregate sum of $234,869.23 for the taxable periods of October-December, 1941, and January-October, 1942. [R. 25.] Like taxes were also imposed, admittedly due and paid in the sum of $1,155.47 on the net dollar amount of the outright sales—other than from the rental agreements—of rubber products made by the taxpayers during those same taxable periods in the aggregate sum of $12,710.23. [R. 24-25.]

On March 10, 1943, the Commissioner assessed against the taxpayers the amounts of $22,507.23, $5,417.54 and $1,001.54 representing respectively taxes, penalties and interest for the period October 1, 1941, through October 31, 1942, with respect to the federal excise taxes on rubber articles imposed by Section 3406 (a)(7) of the internal Revenue Code (Appendix, *infra*). [R. 24.] On December 24, 1943, the Commissioner abated the penalty previously assessed in the sum of $5,417.54. On January 26, 1944, the taxpayers paid to the Collector $22,507.23 and $2,248.37 representing the foregoing taxes and interest accrued at the time of payment, respectively. On October 13, 1944, the taxpayers timely filed with the Collector a claim for the refund of such taxes and interest, as provided by law, which the Commissioner disallowed and rejected on April 16, 1945. [R. 26.]

The taxpayers do not contest the above assessment in so far as it relates to the taxes in the sum of $1,155.47 based on the total amount received by them from the outright sales of their rubber products to others in the aggregate sum of $12,710.23. They contest only that part of the assessment relating to taxes and interest assessed in the aggregate sum of $20,673.38 by reason of the leases made by them with their customers in respect of the rubber products which they manufactured as set forth in their complaint and the claim for refund annexed thereto. [R. 2-17, 24-25, 26.]

The taxpayers' outright sales of their decorative rubber products were made in areas where they were not equipped to render services in connection therewith. In other areas they made leases of the foregoing products to their customers in connection with which they rendered certain services, including the replacement of soiled or damaged decorations with either new or renovated units. These replacements occurred from time to time during the terms of the leases agreed upon with their customers and their replacements did not cause any change with respect to the rentals payable or the rental terms agreed upon in the various rental agreements. [R. 28-29.]

The taxpayers were the lessors and were not the users of the rubber products which were leased to their customers by the rental agreements. Such products were used by their customers who were the lessees thereof. In no instances did the taxpayers use the foregoing products which they manufactured. [R. 29.]

The taxpayers did not include the excise taxes in question on the articles rented by them in the rental charges therefor, nor did they collect the amounts of taxes there-

on from their customers regardless of whether the customers were vendees or lessees. [R. 29.]

Upon the basis of the foregoing facts, the District Court concluded as a matter of law and held that the taxes in question were properly assessed against and paid by the taxpayers on the ground that the rental agreements were leases which constituted taxable sales, and that therefore the revenues derived therefrom were taxable rentals within the meaning of the taxing statute. [R. 29-30.] It thereupon entered judgment in favor of the Collector accordingly [R. 31-32], from which the taxpayers appealed to this Court for review. [R. 37.]

Summary of Argument.

The rental agreements were leases which constituted statutory taxable sales of the taxpayers' rubber products subject to excise taxes on the total gross revenues derived therefrom. The court below found upon the evidence that the taxpayers were the lessors and not the users of the articles they manufactured and leased to their customers under the rental agreements, that the products were used by the customers who were the lessees thereof, and that the taxpayers never used such articles which they manufactured in the operation of their business. There is ample evidence to support these findings and they should therefore be affirmed upon review. The provisions of the rental agreement and the evidence clearly confirm the Commissioner's determination and the District Court's finding and conclusion that it was a lease, in both form and substance, according to the intention of the parties. The evidence shows that it contained all the essential elements of a valid lease—definite agreement as to the extent and boundary of the property leased, as to term, as

to price, and as to the time and manner of payment. Moreover, it is clear that the mere rendition of services in connection with the leased articles does not take the taxpayers' case out of the taxable category as there is no provision for exemption therefor under the statute.

Since the rental agreements constituted leases resulting in statutory taxable sales, the taxpayers' leased products were "used" only by their lessees, and therefore Sections 3441 (b) and 3444 (a) of the Internal Revenue Code are inapplicable. There is no basis for the taxpayers' contention that the court below erred in failing to construe Section 3441 (b) as prescribing the manner in which the tax should be computed in cases of sales other than at wholesale; in failing to construe Section 3441 (c) as prescribing the time of payment of the tax in the limited instances enumerated therein; and in determining that the taxpayers did not use their products in the operation of their business within the meaning of Section 3444 (a) of the statute. We have already shown that the rental agreements constituted leases within the meaning of the statute, that there were no sales but only leases herein, and that therefore both the Commissioner and the court below properly used the measure of tax as prescribed in such cases by Section 3441 (c)(1) of the Code. There is no basis for computing the tax on the fair wholesale market price under Section 3444 (a) for there were only leases involved herein and the taxpayers did not *use* their products in the operation of their business. The taxpayers were the lessors and therefore they could not have used the articles at the same time they were being used by their lessee-customers.

ARGUMENT.

The Rental Agreements were Leases Which Constituted Statutory Taxable Sales of the Taxpayers' Rubber Products Subject to Excise Taxes on the Total Gross Revenues Derived Therefrom.

The District Court found and held that the excise taxes in question were properly assessed upon the total gross revenues derived by the taxpayers during the thirteen-months' taxable period involved herein on the grounds that the taxpayers were not the "users" of the rubber products which they manufactured and leased to their customers under the rental agreements used by the taxpayers in the operation of their business. On the contrary, it held that the customers who were the leasees thereunder were the users of the articles, and that the rental agreements were leases which constituted statutory taxable sales with the result that the revenues derived therefrom were taxable rentals. [R. 20-30.] We submit that the court below was correct in so holding.

The issue presents primarily a question of fact as to whether the taxpayers' products were rented under leases to their customers which constituted statutory taxable sales for tax purposes, or were merely "used" by the taxpayers in the operation of their business,[1] within the meaning of the pertinent statute and regulations, as the

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[1]Another question involved in the court below was whether the taxpayers had included the manufacturer's excise taxes in the price of their rubber articles with respect to which they were imposed or had collected the amount thereof from any of their alleged vendees [R. 21], no recovery being available in such instances. Section 3443 (d) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 3443); Section 316.94, Treasury Regulations 46 (1940 ed.). The District Court found and held in the negative in respect to this question [R. 22, 29], and it is not involved in this appeal.

District Court stated. [R. 20.] We contend the former and the taxpayers claim the latter is correct.

In the first place, the taxpayers conceded below [R. 12-13, 26] and they do not dispute here that the excise taxes in the sum of $1,155.47 were properly assessed and collected on the gross receipts of $12,710.23 representing outright sales of their rubber products to others, as distinguished from the total gross revenues realized from the rentals thereof. [R. 24-25, 26, 52-53.] Accordingly, only the remaining total gross receipts of $234,869.23 which the taxpayers derived from the rental agreements and on which taxes and interest in the aggregate sum of $21,351.76[2] were assessed and collected [R. 25-26, 55], are in dispute (Br. 36). Moreover, the parties stipulated that the gross receipts from rentals of the taxpayers' products in the operation of their business constituted "Gross Revenue" [R. 55, 108], and that such revenues were derived from the taxpayers' use in their business of only the printed form of "Rental Agreement" in evidence and from no other or further written or printed instrument [R. 54-55, 57-58, 73, 82-83], as the District Court found. [R. 25, 27-28.] The issue is therefore narrowed to the determination of whether the aggregate amount of the admitted "Gross Revenue" received by the taxpayers under that single document which constituted a lease must be considered a statutory "taxable sale" subject to tax on the total gross price for which the taxpayers' articles were thus leased.

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[2]Of this sum, only $20,673.38 thereof, representing taxes of $18,795.77 and interest thereon of $1,877.61, is involved in this case [R. 6, 8], as heretofore shown.

A. The "Rental Agreement" Was a Valid Lease Which Constituted a Statutory Taxable Sale.

Determinative of this issue is the question whether the rental agreement under which the taxpayers distributed and serviced the taxable rubber articles manufactured by them to and for the use of their customers constituted a "lease * * * [which] shall be considered a taxable sale of such article," within the meaning of Section 3440 of the Internal Revenue Code, as amended (Appendix, *infra*). If it did, and since the taxpayers conceded that the rubber products in question were taxable articles within the meaning of the taxing statute [R. 5] (Br. 8, 29, 32, 33), it follows that the manufacturer's excise tax of 10% on the articles so leased must be imposed and computed on the total gross "price for which sold," under the provisions of Section 3406 (a)(7)[3] and 3441 (c)(1) of the Code as amended (Appendix, *infra*), as interpreted by Sections 316.5 and 316.9, as amended, of Treasury Regulations 46 (1940 ed.) (Appendix, *infra*).

The Commissioner of Internal Revenue determined that the entire amount of the gross revenues received from rentals of the taxpayers' products was subject to the excise tax under the provisions of Sections 3406(a)(7), 3440 and 3441 (c)(1) of the Internal Revenue Code, as amended. [R. 4, 12, 24.] Whether the articles manufactured by the taxpayers were rented to their customers

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[3]The manufacturer's excise tax imposed on the sales of rubber articles by Section 3406(a)(7), added to the Internal Revenue Code by Section 551 of the Revenue Act of 1941, was terminated by Section 611 of the Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U. S. C. 1940 ed., Supp. V, Sec. 3406, note), Section 601 of which made it inapplicable to such sales after November 1, 1942. [R. 56.]

or were merely "used" by the taxpayers—as distinguished from the customers—in the operation of their business, is primarily a question of fact, as the District Court held. [R. 20.] It is apparent that the taxpayers, under the facts herein, have not met the required burden of overcoming the Commissioner's determination, as they must in order to prevail. *General Utilities Co. v. Helvering,* 296 U. S. 200, 206; *Helvering v. Rankin,* 295 U. S. 123, 131; *Phillips v. Commissioner,* 283 U. S. 589. It is settled that the burden is on the taxpayer, seeking to recover the tax erroneously exacted, to prove the facts establishing the invalidity of the tax. *United States v. Anderson,* 269 U. S. 422. This the taxpayers have failed to do.

The evidence and the construction of the rental agreement show that the parties intended to and did create a lessor-lessee relationship. Thus the evidence shows and the District Court found that the taxpayers' rubber products—other than those sold outright—were distributed to their customers under the rental agreements, and that the taxpayers' representatives changed the articles about every 60 to 90 days, or oftener upon request, and replaced with new ones the soiled, damaged, destroyed and useless articles usually to the extent of approximately 50% thereof during such periods. [R. 28, 61, 71, 74.] (Br. 4.) No additional charge was made for such periodic replacements made from time to time as agreed upon with the customers under the terms of the leases [R. 75] (Br. 5), and they did not affect the amounts of rentals payable or the various terms agreed upon in the rental agreements. [R. 28-29.] Moreover, the only form of rental agreement used by the taxpayers shows that they were the "Lessor"; the customer was the "Lessee"; the agreement was a "New Contract" for "Rent Payable in Advance" at a specified

price ($4.20) which was "Collected for 3 Month" in advance as "Rent from 10-1-41 to 1-1-42" and was "Received [as] Rent" by the taxpayers' representative; the "Merchandise installed is the property of" the taxpayers; that "This lease is revocable by" the taxpayers "or lessee" upon 10 days written notice; and the contract was "Accepted by" the customer as the "Lessee." [R. 27-28, 57-58, 73, 82-83.]

Upon these facts the District Court found that the taxpayers were the lessors and not the users of the rubber products which they manufactured and leased to their customers under the rental agreements, that the products were used by the taxpayers' customers who were the lessees thereof, and that the taxpayers in no instances used such products which they manufactured in the operation of their business. [R. 29.] Such findings, supported by substantial evidence, as herein, will not be disturbed but should be affirmed upon review by this Court. *McCaughn v. Real Estate Co.,* 297 U. S. 606, 608; *Helvering v. Nat. Grocery Co.,* 304 U. S. 282; *Helvering v. Kehoe,* 309 U. S. 277; *Wilmington Co. v. Helvering,* 316 U. S. 164.

It is apparent that under the facts as found, therefore, the rental agreement in question constituted a valid lease for tax purposes within the meaning of the statute and the pertinent Regulations. The statute specifies a "lease of an article" and includes any renewal or extension thereof or subsequent lease of such article. Section 3440, Internal Revenue Code, as amended. If the rental agreement was a lease at all, therefore, these additional statutory provisions clearly embrace the taxpayers' subsequent replacements of the soiled, damaged, or destroyed and discarded articles with renovated or new units from time to time [R. 28] (Br. 4-6), as renewals or extensions of the

previous leases or subsequent leases of the articles, respectively. The taxpayers themselves admit that the rental agreement was a lease at times. Thus, in their motion for a new trial, they stated that the rental agreement was used from time to time for accounting purposes "and was not used *exclusively* and at all times as a 'lease.'" (Italics supplied.) [R. 33.] They do not deny, therefore, but admit by implication that the agreement *was* used at times as a lease. The Regulations define the term "lease" as used in Section 3440 to mean the continuous right of the lessee to the possession or use of a particular article, without interruption, for a period of time and not merely as occasion demands. Section 316.9, Treasury Regulations 46 (1940 ed.), as amended. Under the broad scope of this definition, the rental agreement was clearly a lease and not a sales contract and, in harmony with the authorities, it contradicts the taxpayers' contention that its language precludes a holding that they "leased" their products. (Br. 13.) This is borne out by rulings of the Treasury Department that a lease comes within the purview of the excise tax statute providing that it must be considered a taxable sale where the manufacturers of rubber products retained title to but agreed to furnish tires and inner tubes to operators of some bus companies and to service them at specified rates per mile, within the meaning of Sections 602 and 618 of the Revenue Act of 1932, c. 209, 47 Stat. 169 (substantially like Sections 3406(a)(7) and 3440 of the Internal Revenue Code herein). G. C. M. 11410, XII-1 Cum. Bull. 382-384 (1933). That ruling is cited by the taxpayers for the proposition that leases are taxable only if sufficiently similar to sales which they allege is not true of the rental agreement herein. (Br. 28-29.) The facts show, however, that there were only leases

involved in the taxpayers' transactions with their customers, and therefore it is apparent that the Commissioner and the Court below properly invoked the measure of the tax as prescribed by Section 3441(c)(1) of the Code which alone applies in the case of "a lease."

Apropos of the rental agreement herein, several apt definitions of leases are given in that Treasury ruling. Thus, a lease is defined as nothing but a contract which is governed by the same rules which govern other contracts. *Hinsdale v. McCune,* 135 Ia. 682. It imports a contract by which a person divests himself and another takes possession of lands or chattels for a term. *Moorshead v. United Railways Co.,* 203 Mo. 121. A lease has been defined as a grant for a stated period of the use and possession or something in consideration of something to be rendered. *Coney Island Co. v. M'Intyre-Paxton Co.,* 200 Fed. 901 (C. C. A. 6th). It is necessary to the relationship of landlord and tenant that a reversionary interest remain in the former; otherwise there is an assignment rather than a lease. *Kavanaugh v. Cohoes Power & Light Corp.,* 187 N. Y. Supp. 216. The word "lease" is commonly applied to certain kinds of contracts, some of which amount to conditional sales and others to a bailment for use, under which goods are delivered by one person to another. *Cadwallader v. Wagner,* 7 Kulp (Pa.) 465, 466. These definitions show quite clearly that the articles delivered by the taxpayers to their customers under the rental agreement were leased and that the latter's possession of the articles constituted a bailment for use, the soiling or destruction of the articles during such use being immaterial in that most personal property is worn out and depreciated by use over a short or long period of time. *Cadwallader v. Wagner, supra.* The fact that the tax-

payers, under the rental agreement, had to supply renovated or new articles from time to time as the previously leased units became no longer usable is also immaterial in that the customers kept them under bailment for use and the taxpayers still retained title thereto. [R. 28, 57-58, 73, 83.] The leases accomplished by the rental agreement are within the purpose of the statute (Section 3441 (c)(1)(A)), and are made taxable because of their similarity to sales (Section 3440). Leases were made taxable in the Revenue Act of 1924, c. 234, 43 Stat. 253, because bailers frequently disposed of their goods under a form of contract termed a "lease" which in reality was a contract of sale with payments by installments. S. Rep. No. 398, 68th Cong., 1st Sess., p. 41 (1939-1 Cum. Bull. (Part 2) 266, 294), *re* Section 704 (a), which became Section 604 (a) of the Revenue Act of 1924. Section 618 of the Revenue Act of 1932, providing that the lease of an article shall be considered to be a sale thereof, was retained in the law to prevent evasion of the tax by a lease contract which does not involve the passage of title. S. Rep. No. 665, 72nd Cong., 1st Sess., p. 44 (1939-1 Cum. Bull. (Part 2) 496, 528), *re* "Section 616 of the House bill, retained as Section 605," which became Section 618 of the Revenue Act of 1932. Accordingly, the rental agreement under which the taxpayers' customers had possession and use of the articles over specified periods of time in consideration of the rentals paid therefore, constituted a lease within the intent of Section 3440 of the Internal Revenue Code, as amended, and therefore are taxable sales under Section 3406(a)(7), as amended.

Contrary to the taxpayers' contentions that the rental agreement was not a lease in the legal sense (Br. 10-11), or of the type contemplated by Congress when it inserted

the word "lease" in Section 3440 (Br. 12-21), the history of the taxing statutes involving leases shows quite plainly a Congressional intention to tax manufactured articles that are sold or leased. Thus the current provisions of the Internal Revenue Code (Sections 3440, 3441, 3442, as amended by Secs. 553 and 307 (a)(5), respectively, of the Revenue Acts of 1941 and 1943, c. 63, 58 Stat. 21 (26 U. S. C. 1940 ed., Supp. V, Sec. 3442), and 3444 (Appendix, *infra*) show a Congressional purpose of anticipating and preventing tax avoidance by the application of the manufacturer's excise taxes to all transactions involving the disposition, lease or use of taxable manufactured articles (with the exception, of course, of tax free sales under Section 3442, as amended). To this end Section 3406(a)(7) imposes the tax on the sale of any taxable article, and Section 3440 imposes the tax on all articles leased instead of sold by providing that the lease of the article shall be considered a taxable sale. Further provision was made in Section 3441(b), as amended, that the tax shall be applied whether the article is sold at retail, on consignment, or sold—otherwise than through an arm's length transaction—at less than the fair market price. Likewise, it is specifically provided in Section 3441(c)(1), as amended, that the tax shall apply in case of a lease, as herein, an installment sale where title does not pass until later, a conditional sale, or a chattel mortgage arrangement providing for installment payments. Thus Congress clearly intended to tax all possible dispositions by sale, lease or otherwise which the manufacturer might make in deriving revenues from his products. In addition thereto, Congress enacted Section 3444 to cover a case where the manufacturer did not dispose of the product by lease or otherwise but elected personally

to use it. It provided therein that if any person manufactures and *uses* the article (other than as material in the manufacture of another taxable article to be manufactured or sold tax-free), the tax is measured by the price at which such or similar articles are sold in the ordinary course of trade by the manufacturer, as determined by the Commissioner. Since the articles herein were actually used by the taxpayers' lessee-customers rather than by the taxpayers themselves, the Commissioner and the Court below could not legally apply the measure of the tax—on the fair wholesale market value of the articles so used (Section 316.7 of Treasury Regulations 46 (1940 ed.) (Appendix, *infra*)—provided in Section 3444 but properly applied to the tax measure contained in Section 3441(c) (1) (in the case of a lease), based upon the total rental payments received by the taxpayers under the rental agreement. Moreover, just as the taxpayers state that the excise tax has been imposed on articles "sold or leased" since the enactment of Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057 (Br. 13), Congress has consistently imposed and retained such taxes on leases—except for the four-years' hiatus between the repeal in the 1928 Act and the re-enactment thereof in the 1932 Act—in order to prevent evasion of taxes by lease contracts. S. Rep. No. 398, 68th Cong., 1st Sess., p. 41 (1939-1 Cum. Bull. (Part 2) 266, 294) *re* 1924 Act; S. Rep. No. 665, 72nd Cong., 1st Sess., p. 44 (1939-1 Cum. Bull. (Part 2) 496, 528) *re* 1932 Act.

This lengthy history of taxing a lease as a taxable sale, we submit, readily negatives the taxpayers' contention that the rental agreement is not the kind of lease which Congress intended to be taxed under Section 3440 of the Internal Revenue Code, as amended. (Br. 12-21.) The

taxpayers have cited no authority whatever showing that any lease has ever been excluded from the scope of the taxing statute, and since Congress has never provided for any such exclusions, it is apparent that there is no basis for limiting the terms of the statute to provide an exception in the case of the taxpayers' rental agreement as a particular type of lease entitled to exemption. The provisions of the statute show quite plainly that Congress, having made no exceptions, intended to tax *all* leases. Application of the general rule of giving the instrument its ordinary meaning, therefore, leads inescapably to the conclusion that the rental agreement was a valid lease which must be considered a taxable sale under the explicit and unambiguous language of Section 3440 of the Code.

The provision and terms of the rental agreement and the evidence clearly confirm the Commissioner's determination and the District Court's finding and conclusion that it was a lease, in both form and substance, according to the intention of the parties. [R. 12, 24, 27-28, 61, 74.] They plainly show that the taxpayers and the customer both intended and considered that the original instrument or the renewal thereof was a lease of the article distributed and serviced thereunder. The instrument denominates the parties as lessor and lessee, respectively, and contains all the essential elements of a lease. [R. 27-28, 57-58, 73, 82-83.] The facts show affirmance and intention on the part of the taxpayers of the lessor-lessee relationship in dealing with their customers and that they insisted that the latter assume the role of and remain lessees. Thus we have the several points of mutual agreement necessary to establish a valid lease—definite agreement as to the extent and boundary of the property

leased, definite and agreed term, definite and agreed price of rental, and the time and manner of payment—as set forth in *Levin v. Saroff,* 54 Cal. App. 285, cited by the taxpayers. (Br. 11.) These facts also negative the taxpayers' contention that because they changed the articles from time to time under the rental agreement[4] (Br. 7-8, 10-11, 12-13), the agreement was not a lease in the legal sense for the customers allegedly had no right of possession and use of the particular articles, without interruption, for a period of time, as prescribed by the Regulations and as contemplated by Congress in Section 3440. (Br. 10-21.) The taxpayers have cited no facts or authority whatever to show or indicate that the title and unambiguous terms of the rental agreement, prepared and formulated by them and not by the customers, establish that a lease was not intended by the parties, as plainly indicated therein, or that any other relationship than that of lessor-lessee was intended. Moreover, contrary to the taxpayers' contention that the rental agreement was not a lease because it allegedly did not cover any specific property or type of property (Br. 10-11), the evidence shows that the property was clearly and specifically identified as follows [R. 27]: "Rubber Leaf 20-18″ clips installed" and "20-18″ R. L. @ 7¢-$1.40." Even if it had not been thus specifically identified, however, the agreement nevertheess contained all the essential

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[4]It will be noted that many of the facts, as stated by the taxpayer (Br. 4-8), are argumentative.

elements of a lease (G.C.M. 11410, XII-1 Cum. Bull. 382, 384 (1933)), as heretofore shown.

The taxpayers contend that the rental agreement was merely a service ticket and that the rentals paid thereunder were service charges with the result that the agreement fails to measure up to a lease in the legal sense. (Br. 5-7, 10-21.) The facts, however, show otherwise. We have already shown that the rental agreement alone constituted a lease according to the obvious intention of the parties. In addition thereto, the existence of such intention is shown by the taxpayers' continuous and indiscriminate references and terminology characterizing and relating to a lease before and up to the time the action herein was filed. Thus, in the claim for refund, filed approximately 16 months before the suit [R. 2-17], they stated that their organization was "engaged in the business of renting and selling" their products [R. 9]; that they "rented" the products which were "out on rent" to their customers for which "rentals" were charged [R. 10]; and such lease terms were used consistently throughout the statement attached to the claim. [R. 9-12.] Likewise, such terms were used repeatedly in the schedules attached to the refund claim showing the "Number of Units on Rental First of Each Month" running into the hundreds of thousands, for example [R. 17], and that the taxpayers regularly maintained a "Rental Department" [R. 13-14.] Like or similar terms were also used variously in the taxpayers' complaint filed herein [R. 5, par. 10] and in the stipulation of facts [R. 53-54, Par. V],

and the rental of the taxpayers' leased articles was recognized and admitted affirmatively in the testimony given by one of the taxpayers' witnesses.[5] [R. 61.] Finally, the taxpayers now admit that they (Br. 35), "as owners of rubber leaf decorations, devoted those decorations to *rental* purposes * * *." (Italics supplied.) These facts, of themselves, we submit, amply support the District Court's finding and conclusion that the taxpayers were the lessors of the products which they leased to their customers and therefore the rental agreement used by them constituted a lease, the revenues from which were taxable rentals. [R. 29-30.]

The foregoing negatives the taxpayers' contention that the amount of gross revenues received under the rental agreement was not rentals from leases but was for services rendered with respect to the decorative articles installed and regularly serviced by its representatives who replaced the soiled and damaged decorations with renovated or new units periodically in the business establishments of their various customers. (Br. 4-8, 12-21.) In this connection the court below found that although, in a sense, the taxpayers were rendering services because almost any rented article requires a certain amount of servicing, nevertheless they were, at the same time, disposing of a portion of their products by this method of service for they were thereby creating a demand which resulted in renting their products on written rental agreements in-

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[5]The taxpayers' witness and general sales manager, Everett C. McClintock, in answer to the District Court's question, "In other words, you *rent* these [articles] and render a service with them?" answered "Yes"; and to the question, "That is part of the service that you furnish when you *rent* these decorations?" the witness replied, "That is right." (Italics supplied.) [R. 61.]

stead of selling them, and that therefore the evidence established the fact that the taxpayers' products were rented and re-rented to their trade. [R. 22.] It is the usual and customary practice, of course, for the manufacturing lessor of taxable articles in many cases to service them with or without additional charge to the lessee, but the rendition of such services does not make the rentals received therefrom exempt from tax any more than it would make the sales prices exempt on products serviced by the vendor for the vendee. This is true in the case of many kinds of business and office machines, for example, many of which require constant servicing from time to time by the vendors or lessors but nevertheless are taxable on the price for which sold.[6] A good example thereof is the sale of typewriters which require frequent servicing thereafter by the vendor without any exemption from tax of the proceeds of sale on that account, as pointed out by the court below in the colloquy with one of the taxpayers' witnesses. [R. 62.]

Quite clearly, therefore, the mere rendition of services does not enable the manufacturer of the product to escape the excise tax thereon, and it is fair to assume that if Congress had intended that lessors and vendors were entitled to tax exemption merely by giving their customers certain services with or without charge, it would undoubtedly have so provided in the statute. It is noteworthy in this connection that the statute imposes the tax on a lease of a commodity as a taxable sale without pro-

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[6]See Section 3406(a)(6) of the Internal Revenue Code, as added by Section 551 of the Revenue Act of 1941, providing for the imposition of such excise taxes on many kinds of "Business and store machines" sold by the manufacturer or producer.

viding for any exemption whatever for services rendered in connection therewith. It grants exemptions only in such cases as tax-free sales or articles for use by the vendee as material in the manufacture of other articles taxable thereunder or for resale to other manufacturers, for example,[7] but no exemption is provided in the case of services rendered, with or without charge, in connection with the product sold or leased.

Although the taxpayers may have rendered services to an unusual degree, as contended (Br. 4-6, 8), there is nothing in the taxing statute authorizing or allowing segregation and allocation of the rentals paid by their customers as between rentals and services. Even if there were, the taxpayers would be in no position now to take advantage thereof because the issue was not raised or tried in the court below [R. 2-17], nor was it timely raised in the claim for refund filed with the Commissioner [R. 7-17], as would have been required in order for the taxpayers to prevail in a suit for the recovery of federal taxes. Section 3772 (a), Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 3772; Sections 29.322-3 and 29.322-7 of Treasury Regulations 111, promulgated under the Internal Revenue Code; *Angelus Milling Co. v. Commissioner*, 325 U. S. 293; *United States v. Felt & Tarrant Co.*, 283 U. S. 269; *Dascomb v. McCuen*, 73 F. (2d) 418 (C. C. A. 2d); *Taber v. United States*, 59 F. (2d) 568 (C. C. A. 8th). Moreover, in so far as the

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[7]Section 3442 of the Internal Revenue Code, as amended by Section 553 of the Revenue Act of 1941 and Section 307(a)(5) of the Revenue Act of 1943. In such cases, of course, the taxpayers must establish proof of the right to exemption. Section 316.23 of the Treasury Regulations 46 (1940 ed.).

record shows, it is apparent that the selling price of the taxpayers' leased products, stipulated to have been an average of $.37945 per unit [R. 52], included the cost of all the services rendered in connection therewith by the taxpayers to their customers during the period of each lease for they assert that no additional charge was made therefor. (Br. 5.) In any event, the customers got the use of the taxpayers' articles and the concomitant services under the rental agreements and the taxpayers received full compensation therefor approximating, it may be assumed in the absence of evidence to the contrary, the total sales price of the units installed. The history of the excise tax laws given by the taxpayers (Br. 12-17) furnishes no basis, and they cite no authorities, to support an exemption from the tax by reason of the rendition of services in connection with the leases of their manufactured products. Certainly G. C. M. 11410, XII-1 Cum. Bull. 382-384 (1933), relied upon by the taxpayers (Br. 26-29), lends no support thereto.

People's Outfitting Co. v. United States, 58 F. (2d) 847 (C. Cls.), relied on by the taxpayers (Br. 14-15, 16), is not in point for it involved the question whether a certain document should be construed as a conditional sale or as a lease. There the court held that the transactions constituted conditional sales of jewelry and not leases, and therefore no excise tax was payable under Section 604 of the Revenue Act of 1924 where the final payment was not made before February 26, 1946, the date of the enactment of the Revenue Act of 1926. There is nothing in that case to support the taxpayers' contention (Br. 16) that although the transaction was called a lease in the statute, what was actually intended was a lease which amounted to a sale.

Likewise, *Indian Motorcycle Co. v. United States,* 283 U. S. 570, cited by the taxpayers (Br. 20-21), does not help. The Court held there that under the principle that the instrumentalities, means and operations whereby the several States exerted their governmental powers are exempt from taxation by the United States, the sale of motorcycle to a municipal corporation for use in its police service was not subject to the excise tax under Section 600 of the Revenue Act of 1924. Thus that case involved a sale, not a lease, and is therefor not applicable herein.

Gould v. Gould, 245 U. S. 151, relied on by the taxpayers (Br. 16), is not in point. That case involved the question whether certain income was taxable or nontaxable and the Court decided to resolve the doubt in favor of the taxpayer and against the Government. Since the taxpayers concede taxability of the rubber articles herein (Br. 8, 29, 32, 33), and merely the correct *measure* of the tax is involved, the principle enunciated in the *Gould* case is inapplicable.

Accordingly, we submit that the rental agreements were leases which constituted statutory taxable sales of the taxpayers' rubber products subject to excise taxes on the total gross revenues derived therefrom, within the meaning of Sections 3406 (a)(7), 3440, and 3441 (c)(1) of the Code, as amended, as interpreted by Sections 316.5 and 316.9, as amended, of Treasury Regulations 46 (1940 ed.).

B. Since the Rental Agreements Constituted Leases Resulting in Statutory Taxable Sales, the Taxpayers' Leased Products Were "Used" Only by Their Lessees, and Therefore Sections 3441(b) and 3444(a)(1) of the Internal Revenue Code Are Inapplicable.

The taxpayers contend that the District Court erred in failing to construe Section 3441 (b) of the Internal Revenue Code, as amended, as prescribing the manner in which the tax should be computed in the case of taxable sales other than at wholesale, and to construe Section 3441 (c) as prescribing the time of payment of the tax in the limited instances enumerated therein. (Br. 22-33.) They also claim that it erred in determining that the taxpayers did not "use" their products in the operation of their business, within the meaning of Section 3444 (a)(1) of the Code, as amended. (Appendix, *infra.*) (Br. 33-36.)

Contrary to the taxpayers' contentions, however, we have already shown that the rental agreements constituted leases within the meaning of the statute, and that the District Court so found and held upon the evidence. We have also shown that there were no sales but only leases herein, and that therefore both the Commissioner and the court below properly used the measure of tax as prescribed in such cases by Section 3441 (c)(1), which specifically applies to lease transactions. Accordingly, since there were no sales involved in the taxpayers' transactions with their customers, Section 3441 (b) cannot be held applicable to the facts herein. That section provides only for the computation of the tax on the basis of the

price for which sold in cases of articles which are sold at retail, or on consignment, or sold (otherwise than through an arm's length transaction) at less than the fair market price, none of which is involved herein. Moreover, only in cases of sales at less than the fair market price and not at arm's length or on consignment, is the tax computed on the basis of the fair market price. Section 316.15 of Treasury Regulations 46 (1940 ed.) (Appendix, *infra*). Thus there is no basis, and the taxpayers cite no authority, for the contention that the tax should be measured and computed under the provisions of Section 3441 (b) instead of under Section 3441 (c) of the Code, as the taxpayers urge.

Neither is there any basis or authority shown for the contention that the tax should be computed on the basis of the fair wholesale market price under Section 3444 (a)(1) on the ground that the taxpayers manufactured and allegedly used their products in their business. We have already shown that the rental agreements constituted leases within the meaning of the statute and regulations, and that the District Court found upon the evidence and held that the taxpayers were the lessors and not the users of the products leased to their customers under the rental agreements, but that they were used exclusively by their customers who were the lessees thereof. [R. 29.] Quite clearly since the taxpayers were the lessors, they could not also have been, at the same time, the users of the products. The facts show that the customer, as lessee, paid the rental for the possession and use of the articles for the period designated in the lease, and therefore he was obviously the one who was entitled to the use thereof and who actually used it, as provided in the statute. (Section 3444 (a)(1).) Only "If a person manufactures

* * * an article * * * and uses it for any purpose" other than as material in the facture of another article which will be taxable or sold tax-free under the statute, "in the operation of a business in which he is engaged," does "the use" thereof make him liable for tax thereon which "will be computed on the basis of the fair market price of the article." Section 316.7, Treasury Regulations 46 (1940 ed.) (Appendix, *infra*). This, of course, excludes the taxpayers' case from coming within the provisions of Section 3444 (a)(1) in that they could not have been using the articles in the operation of their business at the same time that the lessees were using them in *their* business for the duration of the leases. The taxpayers' claim that they were users of the articles, therefore, is clearly erroneous for they were merely the manufacturers thereof and the lessees were the users under the leases. Consequently, the Commissioner and the court below had no alternative than to determine and hold that the tax was properly imposed on the total gross rentals and due, paid and collected under the provisions of Sections 3406 (a)(7), 3440, and 3441 (c)(1)(A) of the Internal Revenue Code, as amended, as heretofore shown.

The taxpayers' contention (Br. 33-35) that they are liable for the tax based upon only the fair wholesale market price but not upon the total gross revenues received from the lessees, is not supported by the cases relied upon by them, namely, *Kittredge v. Commissioner,* 88 F. (2d) 632 (C. C. A. 2d); *Yellow Cab Co. v. Driscoll,* 24 F. Supp. 993 (W. D. Pa.); and *Fackler v. Commissioner,* 45 B. T. A. 708, affirmed, 133 F. (2d) 509 (C. C. A. 6th). Those cases are clearly distinguishable

for they did not involve leases as herein. They related to claimed deductions for depreciation of property used in the taxpayers' trades or businesses, or devoted to rental purposes exclusively for the production of taxable income in the business, under the income tax laws. Therefore, the taxpayers' claimed analogy of those cases to the present case involving the alleged use of their manufactured products in their trade or business under Section 3444 of the Code herein, is neither apparent nor persuasive.

Such cases as *Lippman's, Inc. v. Heiner,* 41 F. (2d) 556 (W. D. Pa.); *Carter v. Slavick Jewelry Co.,* 26 F. (2d) 571 (C. C. A. 9th), and *People's Outfitting Co. v. United States,* 58 F. (2d) 847 (C. Cls.), relied on by the taxpayers (Br. 25-26), are not in point. The *Lippman's, Inc.* and *Carter* cases involved questions as to whether or not the taxes *attached* on the leased and conditionally sold properties, respectively, where the taxpayers were required to pay the taxes on sums not yet collected from their customers. Therefore, they bear no similarity whatever to the collection of the tax herein on only the actual gross rentals which the taxpayers had collected from their customers without being required to pay taxes on any sums uncollected. Likewise, the *People's Outfitting* case is inapplicable for it involved the question whether a certain document should be construed as a conditional sale or as a lease, as heretofore shown. There is no question of a distinction between two instruments herein but

merely whether the taxpayers' rental agreements constituted leases, and we have already shown that they did under the facts herein.

Accordingly, since the rental agreements constituted leases resulting in statutory taxable sales, it follows that the taxpayers' leased products were used only by their lessees and therefore Sections 3441 (b) and 3444 (a)(1) of the Internal Revenue Code, as amended, are inapplicable.

Conclusion.

The judgment of the District Court is correct and in accordance with law and the authorities. It should therefore be affirmed upon review by this Court.

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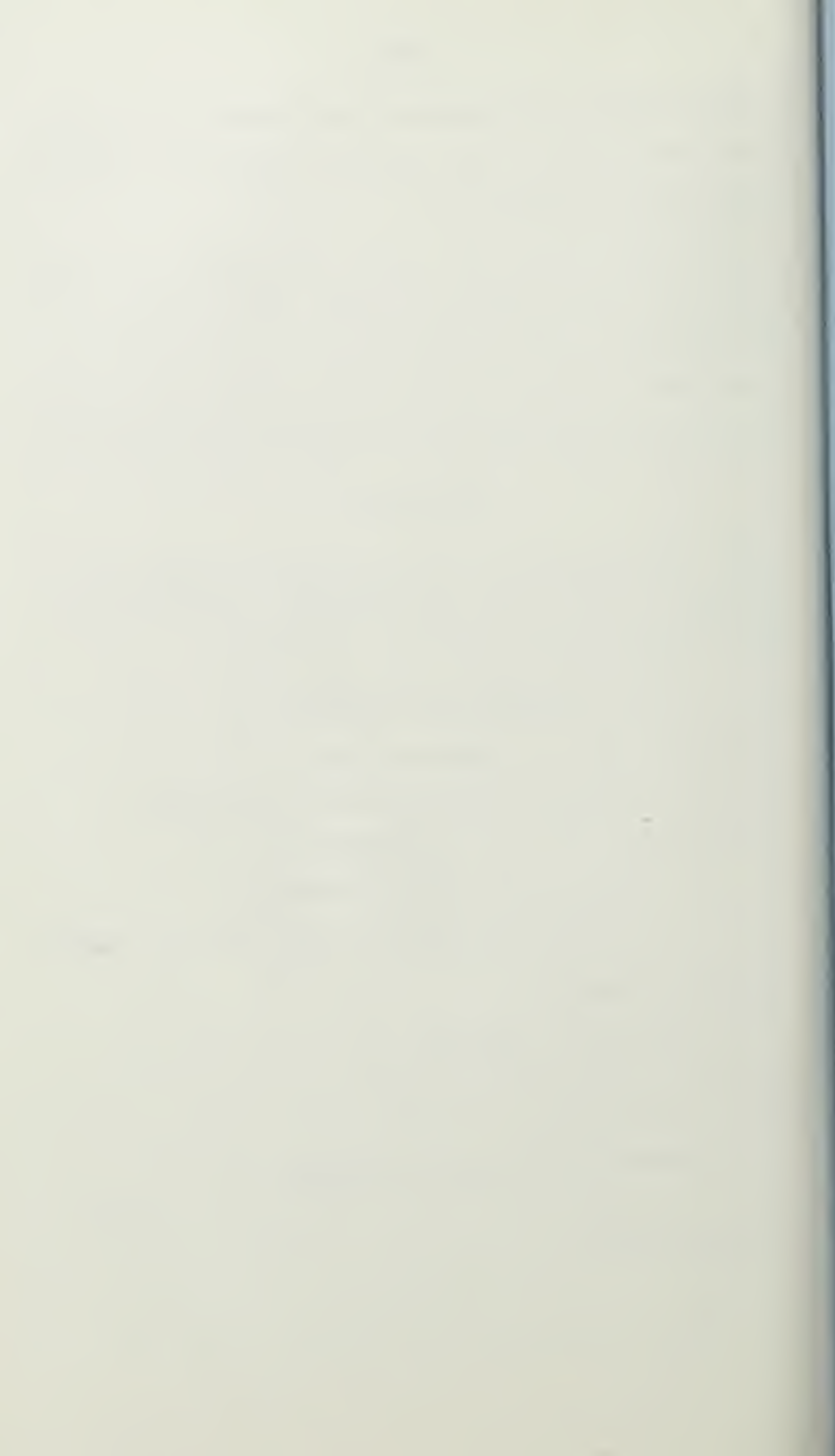

APPENDIX.

Internal Revenue Code:

Sec. 3406 [as added by Section 551 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. Excise Taxes Imposed by the Revenue Act of 1941.

(a) *Imposition.*—There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

* * * * * * * *

(7) *Rubber articles.*—Articles of which rubber is the component material of chief weight, 10 per centum. The tax imposed under this paragraph shall not be applicable to footwear, articles designed especially for hospital or surgical use, or articles taxable under any other provision of this chapter.

* * * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 3406.)

Sec. 3440 [as amended by Section 553 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. Definition of Salé.

For the purposes of this chapter the lease of an article (including any renewal or any extension of a lease or any subsequent lease of such article) by the manufacturer, producer, or importer shall be considered a taxable sale of such article.

(26 U. S. C. 1940 ed., Supp. V, Sec. 3440.)

Sec. 3441 [as amended by Section 549 of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 618 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. SALE PRICE.

(a) In determining for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment; or

(3) sold (otherwise than through an arm's length transaction) at less than the fair market price;

the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

(c)(1) In the case of (A) a lease, (B) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments, (C) a conditional sale, or (D) a chattel mortgage arrangement wherein it is provided that the sales price shall be paid in installments,

there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment.

* * * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 3441.)

Sec. 3444 [as amended by Section 553 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. USE BY MANUFACTURER, PRODUCER, OR IMPORTER.

(a) If—

(1) any person manufactures, produces, or imports an article (other than a tire, inner tube, or automobile radio taxable under section 3404) and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter or sold free of tax by virtue of section 3442, relating to tax-free sales); or

* * * * * * * *

he shall be liable for tax under this chapter in the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) shall be computed on the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner.

* * * * * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 3444.)

Treasury Regulations 46 (1940 ed.), relating to Excise Taxes on sales by the manufacturer under Chapter 29, subchapter A, of the Internal Revenue Code:

Sec. 316.5 [as amended by T. D. 5189, 1942-2 Cum. Bull. 226]. *When tax attaches.*— * * *

* * * * * * * *

In the case of a lease, an installment sale, a conditional sale or a chattel mortgage arrangement, a proportionate part of the tax attaches to such payment. (See section 316.9.) In the case of use by the manufacturer (see section 316.7) the tax attaches at the time the use begins.

Sec. 316.7. *Tax on use by manufacturer, producer, or importer.*—If a person manufactures, produces, or imports an article covered by these regulations, except a tire or inner tube, and uses it for any purpose (other than as material in the manufacture or production of, or as a component part of, another article manufactured or produced by him which will be taxable or sold free of tax under the provisions of section 316.21 or 316.22), he shall be liable for tax with respect to the use of such article in the same manner as if it were sold by him.

* * * * * * * *

The use by any person, in the operation of a business in which he is engaged, of any taxable article which has been manufactured, produced, or imported by him or his agent, makes such person liable to tax on such use. Except in the case of tires and inner tubes the tax will be computed on the basis of the fair market price of the article. (See section 316.15.) However, the tax on the use of such taxable article will not attach in cases where an individual incidentally manufactures, produces, or im-

ports for his personal use or causes to be manufactured, produced, or imported for the personal use any taxable article.

Sec. 316.9 [as amended by T. D. 5099, 1941-2 Cum. Bull. 267, 270]. *Basis of tax on leases, installment sales, and conditional sales.*—Special provision is made in the law for computing taxes due in the case of losses of articles and installment and so-called conditional sales. The term "lease" means a continuous right to the possession or use of a particular article for a period of time. It does not include the use of an article merely as occasion demands, but the contract must give the lessee the right to possess or use the article, without interruption, for a period of time.

Where articles are leased by the manufacturer, or sold under an installment-payment contract with title reserved, or under a conditional-sale contract with payments to be made in installments, a proportionate part of the total tax shall be paid upon each payment made with respect to the article. The tax must be returned and paid to the collector during the month following that in which such payment is made.

* * * * * * * *

Sec. 316.15. *Fair market price in case of retail sales, consignments, etc., generally.*—The law provides a special basis of tax computation where sales are at less than the fair market price and not at arm's length. The fair market price is the price for which articles are sold by manufacturers at the place of distribution or sale in the ordinary course of trade and in the absence of special arrangements. A sale is not at arm's length when made pursuant to special arrangements between a manufacturer

and a purchaser (as in the case of intercompany transactions). When a sale is not at arm's length and the price is less than the fair market price (as in the case of intercompany transactions at cost or at a fictitious price), the tax is to be computed upon a fair market price to be computed by the Commissioner. No deduction from the fair market price as determined by the Commissioner is permissible.

Where a manufacturer sells articles at retail, the tax on his retail sales ordinarily will be computed upon a price for which similar articles are sold by him at wholesale. However, in such cases it must be shown that the manufacturer has an established bona fide practice of selling the same articles in substantial quantities at wholesale. If he has no such sales at wholesale, a fair market price will be determined by the Commissioner.

If a manufacturer sells regularly at wholesale at several varying but bona fide rates of discount, ordinarily his average selling price for the smallest wholesale lots will be the basis of tax with respect to retail sales. All sales at wholesale are subject to tax on the basis of the actual sale price of each article so sold.

If a manufacturer delivers articles to a dealer on consignment, retaining ownership in them until disposed of by the dealer, the manufacturer must pay a tax on the basis of the fair market price, which will ordinarily be the net price received from the dealer.